BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSALIE OSHEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 174,264
DAZEY CORPORATION	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier requested Appeals Board review of the August 20,1997, Award entered by Administrative Law Judge Robert H. Foerschler.

APPEARANCES

Claimant settled her claim with respondent and therefore did not participate in this appeal. Respondent and its insurance carrier appeared by and through their attorney, Marcia L. Yates of Kansas City, Missouri. The Kansas Workers Compensation Fund (Fund) appeared by and through its attorney, Robert D. Benham of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and considered the stipulations listed in the Award.

ISSUES

The sole issue raised by respondent in its Application for Review is the Fund's liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs and arguments of the parties, the Appeals Board finds that the Award by the Administrative Law Judge should be affirmed.

The facts of this claim are well set out in the August 20, 1997, Award. Essentially they are that claimant had preexisting bilateral carpal tunnel injuries and other repetitive use conditions which were the subject of a prior claim. Thereafter, claimant developed de Quervain's disease and tendinitis in her left upper extremity, another repetitive-use-type injury which is the subject of the present claim. The parties stipulated to an accident date of February 21, 1992.

The parties entered into a settlement with claimant which was approved by the Special Administrative Law Judge on February 18, 1993. That award specifically reserved all issues between respondent and the Fund. Thereafter, in his Award of August 20, 1997, the Administrative Law Judge found the Fund not liable for any portion of the benefits paid in this case.

The purpose of the Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, from workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

> 'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions: . . .
> 15. Loss of or partial loss of the use of any member of the body;
> 16. Any physical deformity or abnormality;

> 17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. *See* K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. *See* K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

> In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto.

Whether the employer had knowledge of a preexisting impairment that could constitute a handicap in claimant's ability to obtain or retain employment is not contested. The issue is whether there was a causal relationship between claimant's preexisting impairment and her subsequent disability that resulted from the subsequent de Quervain's disease condition in her left upper extremity.

No physicians testified by deposition in this case. However, the record contains the office notes and reports of the claimant's two treating physicians, namely Bruce Silverberg, M.D., and Brad W. Storm, M.D. Only Dr. Storm rendered an opinion pertaining to the relationship between claimant's preexisting impairment and the disability resulting from claimant's February 21, 1992, injury.

Dr Storm's opinion was that claimant has a 12 percent functional impairment to her left upper extremity based upon range of motion limitation to the thumb and loss of grip strength. He apportioned 50 percent of this rating to claimant's previous carpal tunnel syndrome and surgery. The remaining 50 percent he attributed to the de Quervain's condition that he had treated. Claimant's disability claim for the de Quervain's disease was

settled based upon Dr. Storm's entire 12 percent rating which included the disability due to claimant's previous carpal tunnel syndrome condition.

Claimant's de Quervain's disease was not caused or contributed to by the carpal tunnel syndrome. However, K.S.A. 1991 Supp. 44-567(a) provides for liability to be imposed against the Fund not only where the preexisting condition caused or contributed to the injury but also where the preexisting impairment contributes only to the resulting disability.

In Cody v. Jayhawk Pipeline Corporation, 222 Kan. 491, 492, 565 P.2d 264 (1977) the Kansas Supreme Court found:

> The present case is not one where the injuries would not have occurred "but for" the pre-existing impairment. The medical evidence clearly reflected that the present injury would have happened irrespective of the existence of the previous injury, and the examiner and director were correct in that conclusion. This, however, is a "contributing to" case under K.S.A. 44-567 (a) (2). The issue thus becomes whether medical evidence established the extent, if any, to which claimant's pre-existing impairment contributed to his disability resulting from the second injury.

Citing Blevins v. Buildex, Inc., 219 Kan. 485, 488, 548 P.2d 765 (1976). *See also* Barke v. Archer Daniels Midland Co., 223 Kan. 313, Syl. ¶ 1, 573 P.2 1025 (1978).

Although Dr. Storm does not relate claimant's preexisting condition as a contributing factor in the claimant's injury, he does relate half of the ultimate 12 percent impairment to the preexisting carpal tunnel syndrome condition. This rating is consistent with Dr. Silverberg's opinion that claimant's preexisting impairment to the left upper extremity was 5 percent. Dr. Storm's rating is based upon his findings of limitations in range of motion of the thumb and loss of grip strength. Both the present injuries and the preexisting carpal tunnel syndrome condition contributed to these limitations. The disability for those conditions could not be measured separately. Therefore, respondent has met its burden of proving a 50 percent contribution from the preexisting physical impairment to the disability for which an award was issued in this case.

The Appeals Board finds the opinion testimony of Dr. Storm to be persuasive evidence that although claimant's preexisting conditions did not cause or contribute to the de Quervain's disease, which is the diagnosis for the injury which is the subject of this claim, the preexisting conditions did, nevertheless, contribute 50 percent to claimant's resulting disability. Accordingly, respondent has met its burden of proving Fund liability. The Award by the Administrative Law Judge should be reversed to find the Fund liable for one-half the cost of the settlement award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated August 20, 1997, should be, and is hereby, reversed, and the Workers Compensation Fund is ordered to reimburse respondent, Dazey Corporation, and its insurance carrier, Insurance Company of North America, for one-half the cost of the award entered February 18, 1993, by Special Administrative Law Judge Robert B. Van Cleave.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Kansas City, Missouri
Robert D. Benham, Kansas City, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director